DOCUMENT RESUME

ED 458 846 HE 034 475

AUTHOR Simpson, Michael D.
TITLE Eleventh Amendment Immunity and Academic Freedom.
INSTITUTION National Education Association, Washington, DC. Higher Education Research Center.
PUB DATE 1999-10-00
NOTE 8p.; Theme issue.
AVAILABLE FROM For full text: http://www.nea.org/he.
PUB TYPE Collected Works - Serials (022) -- Reports - Descriptive (141)
JOURNAL CIT NEA Higher Education Research Center Update; v5 n3 Oct 1999
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Academic Freedom; *College Faculty; *Court Litigation; Freedom of Speech; Intellectual Freedom; Professional Autonomy; *Teacher Rights
IDENTIFIERS *Eleventh Amendment; Seminole (Tribe)

ABSTRACT

This "Update" discusses the impact of the "Seminole Tribe v. State of Florida" decision on higher education. In essence, the Court in this decision rescinded the doctrine of "Eleventh Amendment immunity" and ruled that Congress has only limited power to enact laws that apply to state governmental entities, including public colleges and universities. This means that Congress may not have the constitutional power to extend some federal job protections and benefits to persons employed by public institutions of higher education. Congress doesn't have the power to give employees of public colleges and universities the right to sue their employers in federal court. However, this power is partially restored through the Fourteenth Amendment. Some court decisions related to higher education are reviewed with regard to age discrimination suits by faculty members, family and medical leave entitlement, disability discrimination, and other federal civil rights laws. In sum, the "Seminole Tribe" decision is a radical decision that fundamentally changes the balance of power between Congress and the states. When collective bargaining is permitted, higher education faculty and staff can bargain for civil rights protection and they need not be bound by the view that the state can do no wrong and that public sector employees serve at the pleasure of the sovereign state. With regard to academic freedom the courts are making a critical and dispositive distinction between faculty speech outside the classroom and speech inside the classroom. Recent court decisions suggest that there is no First Amendment protection inside the classroom. Three recent court decision show a real curtailment of the free speech rights of faculty when they are speaking in their roles as employees. (Contains 31 endnotes.) (SLD)

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ED 458 846

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VOLUME 5 • NUMBER 3 • OCTOBER 1999

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THREAT TO CIVIL RIGHTS

Three years ago the U.S. Supreme Court handed down a revolutionary decision known as *Seminole Tribe v. State of Florida*.[1] It is not an exaggeration to say that this one court decision has the potential to severely weaken or even abrogate federal civil rights protections for faculty and staff employed by public colleges and universities.

In essence, the Court in *Seminole Tribe* resurrected the doctrine of "Eleventh Amendment immunity" and ruled that Congress has only *limited* power to enact laws that apply to state governmental entities, including public colleges and universities. This means that Congress may not have the constitutional power to extend some federal job protections and benefits to persons employed by public institutions of higher education.

While Article I of the U.S. Constitution gives Congress the power to legislate in certain areas (*e.g.*, interstate commerce), the Eleventh Amendment (ratified some nine years after the Constitution) recognizes the sovereign immunity of the states and provides that individuals can't sue states in federal court.[2]

In *Seminole Tribe*, the High Court said that the Eleventh Amendment trumps Article I. This decision means that Congress doesn't have the power under Article I to pass laws that give employees of public colleges and universities the right to sue their employers in federal court.

A LOOPHOLE

But there is a "loophole" that permits some lawsuits against state entities. The Supreme Court has said that Congress can abrogate the states' Eleventh Amendment immunity by enacting legislation pursuant to its power to enforce the Fourteenth Amendment.[3]

The Fourteenth Amendment, which was ratified soon after the Civil War, prohibits states from denying to citizens the "Equal Protection of the laws." Section 5 of the Fourteenth Amendment specifically grants Congress the power to pass legislation to enforce the mandates of the Fourteenth Amendment.

This means that, even though the Eleventh Amendment took away Congress' power to pass laws allowing states to be sued in federal court, that power was partially restored by the Fourteenth Amendment.

THE IMPACT ON HIGHER EDUCATION FACULTY AND STAFF

What does this mean for higher education faculty and staff?

Over the last 25 years, Congress has enacted about ten different federal laws that provide civil rights protections for the employees of public institutions of higher education. Some of these statutes ban discrimination on the basis of race, gender, disability, and age.[4] Other laws affirmatively grant employees certain job benefits, such as the right to unpaid family and medical leave, overtime pay, and minimum wage.[5]

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Since the *Seminole Tribe* decision, state employers have claimed Eleventh Amendment immunity in virtually every case in which they were sued by employees for violating one of these civil rights laws. The results, to put it mildly, have been mixed.

In general, the courts are saying that, if the particular law merely "enforces" rights already found in the Fourteenth Amendment (*e.g.*, prohibitions on race or gender discrimination), then Eleventh Amendment immunity is not available. Where, however, Congress has attempted to create "new" rights or employment benefits for state workers, then Eleventh Amendment immunity is available, and individual employees cannot sue for violations of their rights.

Here's a scorecard of some the court decisions to date:

Age Discrimination. Last year, in an NEA-funded case called *Kimel v. Florida Board of Regents*,[6] the U. S. Court of Appeals for the Eleventh Circuit ruled that faculty members in the University of Florida system cannot sue the university for age discrimination under the Age Discrimination in Employment Act (ADEA). In another ADEA case involving a University of Minnesota professor, the Eighth Circuit Court of Appeals last year reached the same conclusion.[7] Other courts, however, have ruled that state colleges and universities are not entitled to Eleventh Amendment immunity for ADEA violations.[8]

Family and Medical Leave. Also last year, two federal courts ruled that employees at the University of Ohio[9] and the University of Alabama[10] cannot sue their schools for violating their rights under the Family and Medical Leave Act (FMLA). At least one other court has reached the opposite conclusion.[11]

Disability Discrimination. Within the last two years, federal courts in Alabama,[12] North Carolina,[13] and Ohio[14] have issued rulings that state workers (including employees of public colleges and universities) cannot sue their employers for violating their rights under the Americans with Disabilities Act (ADA). Other courts have held that state defendants are not entitled to Eleventh Amendment immunity from ADA lawsuits.[15]

As to several other federal civil rights laws, however, the results are not so mixed.

Fair Labor Standards Act. In cases involving employee rights to minimum wage and overtime protection under the Fair Labor Standards Act, for example, the lower courts have ruled 15-0 that state employers are entitled to Eleventh Amendment immunity and that individual workers can't sue.[16]

Title VII. On the other hand, lower courts have ruled 4-0 that state employers are not immune from suit for violations of Title VII (race, sex, religion, color, and national origin discrimination).[17]

Title IX. Similarly, by a 4-to-0 margin, the lower courts have held that educational institutions can be sued by individuals for violating Title IX, which prohibits gender discrimination in schools that receive federal funds.[18]

Patent and Trademark Infringement. In companion cases from Florida, the Supreme Court ruled last June that state agencies, including public colleges and universities, are immune from suit for violations of the federal patent infringement and trademark infringement laws.[19] The Court said that Congress does not have the power to abrogate the states' Eleventh Amendment immunity from suit for these kinds of statutory violations.

The Supreme Court has decided to hear another Eleventh Amendment case and, hopefully, will clarify the extent to which public higher education employees are protected by federal civil rights laws. The Court has agreed to review the *Kimel* decision cited earlier, a case from Florida funded by NEA that presents the question

whether Congress has the power under the Fourteenth Amendment to extend the protections of the Age Discrimination in Employment Act to the employees of public colleges and universities. The case will be argued in October, with a ruling expected sometime after the first of the year. That decision will provide guidance on whether higher education faculty are covered by most of the other federal civil rights laws as well.

BARGAINING SOLUTIONS

Even though *Seminole Tribe* has seriously eroded many civil rights protections, faculty and staff — through the collective bargaining process — can remedy this problem and can provide for the same legal protections that non-state workers still enjoy. There are at least three possible bargaining solutions:

First, it may be sufficient to include in the agreement a clause in which the employer agrees to waive its Eleventh Amendment immunity. States, if they choose, can waive their immunity,[20] although to be effective, the waiver would have to be fairly explicit. This would permit aggrieved employees to sue the school in federal court for violations of their federal rights.

Second, the employer and union can agree that all employment disputes arising under the various federal civil rights statutes will be resolved through binding arbitration. The arbitrator would apply substantive federal law and award all remedies that would otherwise be available to the employee in federal court.

Third, without specifically referencing federal law, the collective bargaining agreement itself can prohibit discrimination based on the same categories as federal law and can provide for the same kinds of rights and benefits created by FMLA, the FLSA, and the other federal laws.

In sum, *Seminole Tribe* is a radical decision that fundamentally changed the balance of power between Congress and the states. Where collective bargaining is permitted, higher education faculty and staff can bargain for civil rights protection, and they need not be bound by the eighteenth century view that the King can do no wrong and that public sector employees serve at the pleasure of the sovereign state.

ACADEMIC FREEDOM

Appellate courts have decided five academic freedom cases recently, and the teacher or professor lost every time.[21] In brief, the courts are making a critical and dispositive distinction between faculty speech *outside* the classroom and faculty speech *inside* the classroom. As to the former, the courts generally grant First Amendment protection to speech outside the classroom, so long as the teacher or professor is speaking as a "citizen" on a matter of "public concern" rather than as an employee on a matter involving a personal complaint or internal institutional policy.[22]

As to speech inside the classroom, however, recent court decisions suggest that there is no First Amendment protection. When faculty members "speak" in their role as teachers, the courts say, they are speaking as employees. And when they speak in their role as employees, the employer — the school district or university — can tell them what to say and punish them for disobeying. Three recent federal appellate court decisions graphically illustrate this point.

1. *Boring v. Buncombe County Board of Education*. Margaret Boring was a high school drama teacher who was demoted because members of her school board didn't like the controversial ideas contained in the award-winning play *Independence* she selected for her students to perform in a North Carolina state competition. She challenged her punishment on First Amendment grounds and actually won a significant victory when a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled that the doctrine of academic freedom protects teachers "both inside and outside the classroom."[23]

The entire Fourth Circuit voted to rehear the case *en banc* and ruled by a 7-6 margin that high school teachers have no right to academic freedom.[24] The court said that Boring could not challenge her punishment because it arose from a curricular dispute, and "the school, not the teacher, has the right to fix the curriculum."[25] "[T]eachers," the court added, have no "First Amendment right to participate in the makeup of the school curriculum."[26] The six dissenting judges complained that the majority's "astonishing" opinion "eliminates *all* constitutional protection for the in-class speech of teachers" and "extinguishes First Amendment rights in an arena where the Supreme Court has directed they should be brought 'vividly into operation.'"[27] The U.S. Supreme Court last year refused to review the Fourth Circuit's unfortunate ruling.[28]

Even though the *Boring* decision involved the rights of a *high school* teacher, it has been accepted and uncritically applied to defeat the academic freedom claims of *higher education* faculty in two subsequent appellate court decisions.

2. *Edwards v. California University of Pennsylvania.* In this case, a Pennsylvania college professor was suspended for failing to follow the university's approved curriculum. Edwards had used his own syllabus rather than the one adopted by his department. He filed a federal lawsuit challenging his discipline, as well as certain restrictions the university placed on his choice of classroom materials. Citing the *Boring* decision, the U.S. Court of Appeals for the Third Circuit flatly rejected his academic freedom claim. The court said:

"[A]lthough Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom.... Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker.... [Here] the university was acting as speaker and was entitled to make content-based choices in restricting Edward's syllabus."[29]

The Supreme Court refused to review the *Edwards* decision.[30]

3. *Urofsky v. Gilmore.* Six professors employed by various public colleges and universities in Virginia brought this lawsuit challenging a state law that prohibited state employees — including public higher education faculty — from using state-owned computers to access "sexually explicit material" on the Internet. Despite the professors' compelling arguments that the restriction severely hampered their ability to teach, to assign student online research projects, and to conduct research on the Internet themselves, the Fourth Circuit Court of Appeals upheld the law.

What is particularly chilling about the court's decision, though, is its dismissive treatment of the professors' academic freedom claim. Without discussing the differences between higher education and K-12 or otherwise analyzing the policy arguments about the special need for free inquiry and the "marketplace of ideas" on college campuses, the court simply dropped a footnote stating in a single sentence that "Plaintiffs' claim that the Act violates their First Amendment right to academic freedom is foreclosed by our *en banc* decision in *Boring*."[31] In effect, the court is saying that, after *Boring*, higher education faculty have no right to academic freedom.

These are troubling decisions. They illustrate a disturbing trend in the courts and signal a very real curtailment of the free speech rights of college and university faculty, at least when speaking in their roles as employees. Although the Supreme Court has not yet clearly spoken on this issue, there is little reason to hope that, with the current cast of characters, the High Court will step in and stem this dangerous tide.

ENDNOTES

[1]517 U. S. 44, 116 S. Ct. 1114 (1996).

[2]The text of the Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the language of the Eleventh Amendment extends immunity to state entities sued in *federal* court, the Supreme Court ruled in June that the Eleventh Amendment also immunizes state entities from suit in *state* courts as well. *Alden v. Maine*, ___ U.S. ___, 67 U.S.L.W. 4601 (1999).

[3]*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

[4]Federal civil rights laws that ban employment discrimination by public colleges and universities include: Title VI (race), Title VII (race, gender, religion, color, national origin), Title IX (gender), Section 504 of the Rehabilitation Act of 1973 (disability), Americans with Disabilities Act (disability), Equal Pay Act (gender), and Age Discrimination in Employment Act (age).

[5]Federal laws that provide certain job benefits for the employees of public colleges and universities include: Family and Medical Leave Act (unpaid leave for certain purposes), Fair Labor Standards Act (minimum wage and overtime requirements) (covers only non-professional staff), and Uniformed Services Employment and Reemployment Rights Act (reemployment rights after military service).

[6]139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

[7]*Humenansky v. Board of Regents*, 152 F.3d 822 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235).

[8]*Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761 (7th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493 (5th Cir. 1998); *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1998); *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296 (6th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998) (No. 98-821); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540 (10th Cir. 1997).

[9]*Thompson v. Ohio State Univ.*, 5 F. Supp. 2d 574 (E.D. Ohio 1998) (appeal pending).

[10]*Garrett v. Bd. of Trustees of Univ. of Alabama*, 989 F. Supp. 1409 (N.D. Ala. 1998).

[12]*Joliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997).

[13]*Garrett v. Board of Trustees of Univ. of Alabama*, 989 F. Supp. 1409 (N.D. Ala. 1998).

[14]*Brown v. North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997).

[14]*Nihiser v. Ohio Envtl. Protection Agency*, 979 F. Supp. 1168 (S.D. Ohio 1997).

[15]*Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998); *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom., Wilson v. Armstrong*, 118 S. Ct. 2340, 141 L. Ed. 2d 711 (1998); *Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901, 142 L. Ed. 2d 901 (1999), *and cert. granted sub nom. U.S. v. Florida Bd. of Regents*, 119 S. Ct. 902 (1999); *Coolbaugh v. State of Louisiana*, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58, 142 L. Ed. 2d 45 (1998).

[16]*Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997); *Close v. State of New York*, 125 F.3d 31 (2nd Cir. 1997); *Balgowan v. State of New Jersey*, 115 F.3d 214 (3rd Cir. 1997); *Aaron v. State of Kansas*, 115 F.3d 813 (10th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996), *opinion amended on denial of rehearing*, 107 F.3d 358 (6th Cir. 1997); *Bergemann v. State of Rhode Island*, 958 F. Supp. 61 (D.R.I. 1997); *Abrill v. Commonwealth of Virginia*, 145 F.3d 182 (4th Cir. 1998); *Frazier v. Courter*, 958 F. Supp. 252 (W.D.Va. 1997); *Palotai v. University of Maryland College Park*, 959 F. Supp. 714 (D.Md. 1997); *Digiore v. State of Illinois*, 962 F. Supp. 1064 (N.D.Ill. 1997); *Rehberg v. Department of Pub. Safety*, 946 F. Supp. 741 (S.D.Iowa 1996), *aff'd* 117 F.3d 1423 (8th Cir. 1997); *Raper v. State of Iowa*, 940 F. Supp. 1421 (S.D. Iowa 1996), *aff'd* 115 F.3d 623 (8th Cir. 1997); *Walden v. Florida Dep't of Corrections*, 975 F. Supp. 1330 (N.D.Fla. 1996); *Adams v. State of Kansas*, 934 F. Supp. 371 (D.Kan. 1996) *aff'd* 116 F.3d 489 (10th Cir. 1997); *Chauvin v. State of Louisiana & Dep't of Wildlife*, 937 F. Supp 567 (E.D.La. 1996).

[17] *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Varner v. Illinois State Univ.*, 972 F. Supp. 458 (C.D.Ill. 1997), *aff'd* 150 F.3d 706 (7th Cir. 1998); *Ussery v. State of Louisiana through Dep't of Health*, 150 F.3d 431 (5th Cir. 1998); *Ghert v. University of Illinois at Urbana-Champaign*, 974 F. Supp.1178 (D.C.Ill. 1997).

[18] *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998); *Franks v. Kentucky School for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Lam v. Curators of the Univ. of Missouri, at Kansas City Dental School*, 122 F.3d 654 (8th Cir. 1997).

[19] *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, ___U.S. ___, 67 U.S.L.W. 4580 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, ___U.S. ___, 67 U.S.L.W. 4590 (1999).

[20] *Clark v. Barnard*, 108 U.S. 436 (1883).

[21] *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364 (4th Cir. 1998) *(en banc)*, *cert. denied*, ___ U.S. ___, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1999); *Edwards v. California Univ. of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998), *cert. denied*, 119 S. Ct. 1036, 143 L. Ed. 2d 44 (1999); *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, *rehearing denied*, 154 F.3d 904 (8th Cir. 1998), *cert. denied*, ___ U.S. ___ (1999); *Board of Educ. of Jefferson County Sch. Dist. R-1*, 960 P.2d 695, 128 Ed. Law Rptr. 378 (Colo. 1998).

[22] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

[23] *Boring v. Buncombe County Bd. of Ed.*, 98 F.3d 1474 (4th Cir. 1996).

[24] *Boring v. Buncombe County Bd. of Ed.*, 136 F.3d 364 (4th Cir. 1998) *(en banc)*, *cert. denied*, 119 S. Ct. 47 (1998).

[25] *Id.* at 370.

[26] *Id.* at 371.

[27] *Id.* at 380.

[28] *Boring v. Buncombe County Bd. of Ed.*, 119 S. Ct. 47 (1998).

[29] *Edwards v. California Univ. of Pennsylvania*, *supra, note 19*, 156 F.3d at 492-93.

[30] *Supra, note 19.*

[31] *Urofsky v. Gilmore*, *supra, note 19*, 167 F.3d at 196, n.8.

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Office of Higher Education
1201 Sixteenth Street N.W.
Washington, D.C. 20036
202-822-7100
E-mail: Highered@NEA.org

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Higher Education Staff
Christine Maitland — Rachel Hendrickson
Dely Pena — Deborah Mitchell

This issue by Michael D. Simpson, Assistant General Counsel, NEA.

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